Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd

HIGH COURT (PENANG) — SUIT NO 22-100 OF 1988
MOHAMED DZAIDDIN J
3 JULY 1989

Civil Procedure — Costs — Interlocutory proceedings — Whether costs payable forthwith or at conclusion of action — Rules of the High Court 1980, O 59 r 4(1)

The defendant applied for the setting aside of an interim injunction obtained by the plaintiff in respect of the tenancy of certain premises. The application was dismissed with costs by the judge. The plaintiff sought to have the costs of the proceedings taxed. The defendant opposed the taxation on the ground that the plaintiff was not entitled to have the costs of the interlocutory proceedings taxed unless the judge made an order that such costs be paid forthwith. The registrar allowed the objection. The plaintiff appealed.

Held, dismissing the appeal:

(1) Where the proceedings were purely interlocutory, the general rule was that the costs of the proceedings should be settled at the end of the action.

(2) The costs of interlocutory proceedings should only be made payable forthwith or in any event when the party against whom the order has been made has been guilty of oppressive or unreasonable conduct or the party has taken unnecessary or improper action.

(3) In the instant case, there were valid reasons for the defendant to apply to set aside the injunction and certainly such application could not be said to be frivolous or vexatious.

(4) The plaintiff's claim was for a declaration that the tenancy of the premises was valid and subsisting. In addition, he was claiming a permanent injunction against the defendant with respect to the said premises and the merit of the whole case will be litigated at the trial. In the circumstances, it was proper that the costs of the interlocutory applications be taxed and paid at the conclusion of the trial.

Cases referred to

1 *East Asiatic Co (M) Sdn Bhd* v *Kilang Papan Sdn Bhd* (KL Civil Suit No 2157/85) (unreported) (not follod)
2 *Chow Yong Hong* v *Chow See Lim & Anor* [1959] MLJ 23 (follod)
3 *Adam & Harvey Ltd* v *International Maritime Supplies Co Ltd* [1967] 1 All ER 533 (not follod)
4 *Allied Collection Agencies Ltd* v *Wood & Anor* [1981] 3 All ER 176 (not follod)
5 *Graham* v *Sutton, Carden & Co* [1897] 2 Ch 367 (follod)

Legislation referred to

Rules of the High Court 1980 O 59 r 4(1)
Rules of the Supreme Court [UK] O 62 r 4(1)

Choo Hon Choy for the plaintiff/appellant.
NG Sivanandan and *Karin Lim (Ms)* for the defendant/respondent.

Cur Adv Vult

Mohamed Dzaiddin J: This is an appeal by the plaintiff against the decision of penolong kanan pendaftar given on 16 March 1989 ordering that the plaintiff's bill of costs in respect of interlocutory proceedings in this suit be taxed at the conclusion of the trial.

What happened in this case was this. On 19 July 1988, the plaintiff issued a writ against the defendant claiming, inter alia, for a permanent injunction in respect of the defendant's premises at Batu Ferringhi which was let by the defendant to him. On the same date, the plaintiff filed an application in chambers for an interim injunction which was granted by this court. Consequently the defendant applied to set aside the said interim injunction. After hearing counsel, I dismissed the defendant's application, who then proceeded to appeal to the Supreme Court. The said appeal was also dismissed. Thereafter, the plaintiff extracted the High Court order on 11 January 1989. For the purpose of this appeal, the relevant part of the order (as to costs) reads as follows:

> ... and upon encls 7 and 8 coming up for decision on 5 December 1988 it is ordered that both the applications of the defendant be and hereby *dismissed with costs.* (The emphasis is mine.)

On 13 January 1989, the plaintiff filed his appointment of taxation with the bill of costs. At the taxation of the bill before the registrar on 28 February 1989, the defendant opposed the said taxation on the ground that the plaintiff was not entitled to tax his costs of the interlocutory proceedings unless the judge made an order that such costs be paid forthwith. The registrar allowed the objection and held that the taxation should be at the end of the suit.

In the appeal before me, Encik Choo, for the plaintiff, submitted that the registrar was wrong in his decision that the costs be taxed at the conclusion of the trial. He contended that the costs of the interlocutory proceedings should be taxed forthwith under O 59 r 4(1) of the Rules of the High Court 1980. Basically, what the plaintiff was saying was this. Upon reading the aforesaid order, the court intended or deemed to intend that the plaintiff was entitled to tax his costs immediately. Counsel referred me to the cases cited in *Mallal's Supreme Court Practice* at p 756 under para 59/4/2 and Shankar J's decision in *East Asiatic Co (M) Bhd* v *Kilang Papan Aman Sdn Bhd.*[1] Encik Siva, on the other hand, submitted that the general rule that interlocutory proceeding costs be settled at the end of the action should apply here. (See *Chow Yong Hong* v *Chow See Lim & Anor.*[2] He stated that in the circumstances of this case, the court did not intend that costs should be taxed and paid forthwith. Counsel also referred me to the statement of claim and the defendant's defence and counterclaim and stated that despite the order of this court that the case be set down for an early trial, the plaintiff seemed not to be in a hurry to expedite the matter. He felt that the plaintiff might not be successful in his claim and in such an event the plaintiff might not to able to pay any costs as he could be impecunious.

Clearly, the powers of the court in dealing with the question of costs is found in O 59 r 4(1) (which is similar to O 62 r 4(1) of the English Rules of the Supreme Court). It reads as follows:

> Costs may be dealt with by the court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the court for the payment of any costs may, if the court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

From the above rule, it is clear that the court may deal with the question of costs at any stage of the proceedings or after the conclusion of the proceedings. Secondly, the court may, if it thinks fit, order the payment of costs to be paid forthwith notwithstanding that the proceedings have not been concluded. The cases of *Adam & Harvey Ltd* v *International Maritime Supplies Co Ltd*[3] and *Allied Collection Agencies Ltd* v *Wood & Anor*,[4] and the commentary in *The Supreme Court Practice* 1985 para 62/4/1 would appear to me to lay down the general principle that even if the court did not make an order for costs to be taxed and paid forthwith, a party to a summons who was awarded costs was entitled to have them taxed and paid forthwith, although the action had not yet been tried. This was followed by Shankar J in *East Asiatic*.[1] On the other hand, the judgment of Smith J in *Chow Yong Hong*[2] was to the effect that the proceedings being interlocutory, the general rule was that the costs should be settled at the conclusion of the suit.

Therefore, in the circumstances of the whole case, I come to the following conclusion. First, I adopt the decision of Smith J in *Chow Yong Hong*[2] who held that where the proceedings were purely interlocutory, costs should follow the general rule that it should be settled at the end of the action.

Secondly, an order for interlocutory costs should only be made payable 'forthwith' or 'in any event' when the party against whom the order has been made has been guilty of oppressive or unreasonable conduct (*Graham* v *Sutton, Carden & Co*[5]) or the other party has taken unnecessary or improper action (*David Beans on Injunction* (3rd Ed) p 62). Again, according to the same author, the 'order for 'plaintiff's costs in any event' is unusual in injunction cases, being more appropriate to summonses where, for example, a defendant seeks an extension of time'. In the instant case, there were valid reasons for the defendant to apply to set aside the ex parte injunction and certainly such application could not be said to be frivolous or unreasonable.

Thirdly, in the present case, the plaintiff's claim is for a declaration that the tenancy of the premises is valid and subsisting. In addition, he is claiming for a permanent injunction against the defendant with respect to the said premises, where the merit of the whole case will be litigated at the main trial. In the circumstances, I feel it is proper that the costs of the interlocutory application be taxed and paid at the conclusion of the trial.

Finally, which I should add in retrospect, I never intended to order that the costs be taxed and paid forthwith at the time when I gave my decision dismissing the defendant's application with costs.

Accordingly, this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Tan Beng Hong & Co; Presgrave & Matthews.*

Reported by *PS Ranjan*

Chuan Hup Agencies Pte Ltd v Global Minerals (Sarawak) Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO KG 4 OF 1989
HAIDAR J
3 JUNE 1989

Arbitration — Charterparty — Dispute — Whether arbitrable — Submission to arbitration — Plaintiff commencing action regarding dispute but contending that there is no arbitrable dispute — Defendant filing counterclaim — Stay of counterclaim — Arbitrable question raised — Discretion of court — Arbitration Act 1952, s 6

Civil Procedure — Stay of counterclaim — Charterparty — Arbitrable question raised — Discretion of court— Inherent power of court — Arbitration Act 1952, s 6

The plaintiff applied for an order that the defence and counterclaim filed by the defendant be stayed and also made a further application that pending the outcome of the earlier application, all proceedings in the action be stayed. Counsel for the plaintiff later conceded that a stay of the defence could not be ordered but asked that the proceedings in respect of the counterclaim be stayed and that the matters alleged therein be referred to arbitration. The disputes between the parties arose following their entering into a charterparty with each other. The plaintiff contended that the disputes (if they existed) were subject to an arbitration clause in the charterparty and that the defendant had commenced arbitration proceedings in Singapore. It was alleged that there was an admission on the part of the defendant in a document that the charterhire for certain months were due to the plaintiff. It was contended by the defendant that they were entitled to a set-off in respect of certain sums against the charterhire notwithstanding that the charterhire was to be paid 'without discount'.

Held, allowing the plaintiff's application:

(1) The court has in certain cases a discretion to give effect to the agreement for arbitration and need not do so if it thinks it better to do otherwise. However, as master of its own affairs, the court has an inherent power to stay any action which it considers should not be allowed to continue.

(2) The conditions that the plaintiff must satisfy in order to succeed were:

(a) that there must be a valid arbitration agreement covering the question in dispute;
(b) that the plaintiff must be entitled to rely on the agreement;
(c) that the plaintiff must have taken no steps after the appearance of the defendant;